IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.30 OF 2007
WITH
CIVIL APPLICATION NO.52 OF 2007

Mr.Prakash M. Gurani & Ors. ..Appellants.

V/s.

Gasper Cooperative Hsg. Soc. Ltd. & Ors. ..Respondents.

Mr.Vinay J. Hegde for appellants.

Mr.S.S.Joshi i/b Bhalekar & Co. for respondent Nos. 1 to 3.

Mr.R.A.Malandkar, for respondent No.4-BMC.

Mr.Jocum Reis with Rajesh N. Kachare for respondent Nos. 5 and 6.

CORAM: A.M.KHANWILKAR,J

DATE : JANUARY 29, 2007.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Joshi waives notice for respondent Nos. 1,2 and 3, who are the contesting respondents. Mr.Malandkar waives notice for respondent No.4. Mr. Reis waives notice for respondent Nos. 5 and 6. Notice to respondent No.7 to 9 is dispensed with for

the purpose of present proceeding, as no relief is claimed against them.

4. As short question is involved, appeal is taken up for final hearing forthwith by consent of the parties.

5. This appeal from order takes exception to the Judgment and Order passed by the City Civil Court, Greater Bombay dated 15th December, 2006 in Notice of Motion No.4776 of 2006 in L.C.Suit No.5363 of 2006. By this order the trial Court, at ad-interim stage, granted relief in favour of the plaintiff in terms of prayer clause (a), (b), (c), (d), (h) and (i) of the Notice of Motion. The appellants who are defendant Nos. 6 to 9, are not concerned with the ad-interim relief in terms of prayer clause (h) and (i). They are aggrieved by the ad-interim relief essentially in terms of prayer clauses (a) and (c). Counsel for the appellants has confined the argument before this Court only in the context of relief in terms of prayer clause (a) and (c). The same read as under:

> "(a) that pending the hearing and final disposal of the suit, the Defendants Nos. 4 to 8, their servants, agents or any person claiming through or under them be restrained by a permanent order of injunction of this Hon'ble Court from entering into, occupying,

> using the premises earmarked in the approved plans as meter rooms or any part thereof;
>
> (c) that pending the hearing and final disposal of the suit, the Defendants No. 9, her servants, agents or any person claiming through or under her be restrained by an order of injunction of this Hon'ble Court from entering into occupying, using the premises earmarked in the approved plans as society office or any part thereof."

According to the appellants, this relief is in the nature of mandatory order against the appellants who have already entered possession of Unit No.4,8 and 9 respectively, which fact is virtually conceded by the plaintiffs from the averments made in paragraph-13, in so far as defendant Nos. 6 to 8, and paragraph-15, in relation to the defendant No.9.

6. This argument is opposed by the counsel for the respondent Nos.1 to 3/original plaintiffs that ad-interim relief granted is not mandatory order at all. After considering rival arguments, I have no hesitation in accepting the grievance made by the appellants that it was inappropriate for the trial Court to grant mandatory injunction at ad-interim stage in terms of prayer clause (a) and (c), which are concerning the Defendant Nos. 6 to 9. It is not possible to countenance the submission made by the respondents/plaintiffs that the said reliefs are not

mandatory in nature, if considered in the context of averments in the plaint in paragraph-13 and 15. Besides, the only reason recorded by the trial Court for granting such mandatory injunction is that the transaction in favour of the defendant Nos. 6 to 9 is glaring illegality committed by the defendant Nos. 2 and 3 by selling out meter room and office room. Assuming that the transaction is illegal, the fact remains that the said defendants claimed to be in possession and which fact is virtually accepted in averments in paragraph-13 and 15 of the plaint. Thus understood, the question of granting mandatory injunction at ad-interim stage does not arise. It will be open to the trial Court to pass appropriate order while disposing of the Notice of Motion after pleadings are completed.

7. Accordingly, this appeal succeeds. The impugned Judgment and Order is set aside to the extent of relief granted in terms of prayer clauses(a) and (c) respectively. Rest of the ad-interim order passed by the trial Court is not disturbed and shall continue to operate against the concerned defendants.

8. The trial Court is directed to dispose of the

Notice of Motion expeditiously preferably by end of April, 2007. Parties shall complete pleadings before the next returnable date of Notice of Motion, so that the trial Court may proceed to hear notice of motion on the returnable date or such other date, as may be convenient, while ensuring that Notice of Motion is disposed of by end of April, 2007.

9. It is also made clear that the Notice of Motion will have to be decided on its own merits in accordance with the law, uninfluenced by any observations made in the impugned order or for that matter present order, as those observations are only for considering ad-interim relief.

10. In view of the order passed in appeal, Civil application disposed of accordingly.